

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

United States of America

v.

Criminal No. 10-cr-7-JD

Javier Diaz

O R D E R

On January 20, 2010, a grand jury returned a nine-count indictment against Javier Diaz, alleging eight counts of distributing a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and one count of unlawfully possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). After initially waiving his right to a detention hearing, Diaz moved for bail pending trial. At his bail hearing, held February 18, 2010, Magistrate Judge Muirhead denied Diaz's request for bail. An order of detention pending trial was entered February 19. Diaz now moves, pursuant to 18 U.S.C. § 3145(b), for review, revocation, and amendment of the order of detention.

Standard of Review

A district court reviewing a magistrate judge's pretrial detention or release order must "engage in de novo review of the contested order." United States v. Tortora, 922 F.2d 880, 884

n.4 (1st Cir. 1990); see also United States v. Perozzi, No. 09-cr-117-16-SM, 2009 WL 2929292, at *2 (D.N.H. Sept. 9, 2009) (conducting de novo review of magistrate judge's detention order). Under 18 U.S.C. § 3142(g), "[t]he judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning" four categories: "(1) the nature and circumstances of the offense charged, including whether the offense . . . involves . . . a controlled substance," "(2) the weight of the evidence against the person," "(3) the history and characteristics of the person," and "(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release."

"The government typically retains the burden of persuading the court that 'no condition or combination of conditions will reasonably assure the defendant's presence at trial.'" United States v. Newbegin, No. 09-cr-122-01-JD, 2009 WL 2246152, at *1 (D.N.H. July 24, 2009) (quoting United States v. Perez-Franco, 839 F.2d 867, 870 (1st Cir. 1988)). "The [g]overnment must prove the risk of flight by a preponderance of the evidence." United States v. Reynolds, 609 F. Supp. 2d 108, 110 (D. Me. 2009) (citing United States v. Patriarca, 948 F.2d 789, 793 (1st Cir.

1991)). "It must prove by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person or the community." Reynolds, 609 F. Supp. 2d at 110 (citing United States v. Mantecon-Zayas, 949 F.2d 548, 551 (1st Cir. 1991)).

Section 3142(e)(3) establishes a rebuttable presumption that detention is warranted if "there is probable cause to believe that the person committed . . . an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act." The indictment "provides probable cause to believe that appellant has committed an offense for which he may receive a sentence of imprisonment for ten or more years for violation of the Controlled Substances Act." United States v. Dillon, 938 F.2d 1412, 1416 (1st Cir. 1991). Once the presumption applies, the "defendant must produce only 'some evidence' to rebut [it]." Id. (citation omitted). Rebuttal evidence should show that "what is true in general is not true in th[is] particular case." United States v. Jessup, 757 F.2d 378, 384 (1st Cir. 1985), abrogated on other grounds by United States v. O'Brien, 895 F.2d 810 (1st Cir. 1990). "When a defendant produces such evidence, however, the presumption does not

disappear. The burden of persuasion remains on the government and the rebutted presumption retains evidentiary weight."

Dillon, 938 F.2d at 1416.

Discussion

In reviewing the detention order de novo, the court considered Diaz's motion for bail pending trial; an electronic audio recording of the February 18, 2010, bail hearing; the exhibits Diaz submitted at his bail hearing; Diaz's motion for review, revocation, and amendment of the magistrate judge's order; and the government's objection to the motion.

A. Section 3142(e)(3) Presumption

The parties agree that the presumption in 18 U.S.C. § 3142(e)(3) applies, because Diaz is charged with violating 21 U.S.C. § 841(a)(1), for which the Controlled Substances Act prescribes a maximum term of imprisonment of twenty years. See 21 U.S.C. § 841(a)(1) & (b)(1)(C).

B. Rebutting the Presumption

Diaz argues that he successfully rebutted the § 3142(e)(3) presumption, and that the magistrate judge's order of detention was therefore improper. Diaz contends that he is not a flight

risk or a danger to others or the community because he has ties to the Manchester community; he has worked in New Hampshire since approximately 1994; his parents, three minor children, and the children's mothers live or work in the greater Manchester area. Diaz also argues that any concern regarding his risk of flight or dangerousness can be adequately addressed by imposing conditions on his release, such as requiring him to reside with his mother, imposing a curfew, requiring that he surrender his passport(s), and using electronic monitoring and urine testing.

The government objects to Diaz's motion, arguing that the multiple counts of distributing cocaine with which Diaz is charged constitute very serious crimes. The government proffers evidence that each of the cocaine buys was audio recorded and some were video recorded. Government agents executed a search warrant where they found Diaz, and they discovered 8.9 ounces of cocaine, as well as various drug and firearm accouterments. The government also argues that Diaz poses a high risk of flight because he is a citizen of the Dominican Republic and could face deportation if convicted in this case.

A de novo review of the case against Diaz, his history and characteristics, the risk of flight, and the danger he poses to others and the community reveals that no condition or combination of conditions will reasonably assure his appearance. Diaz has

not succeeded in rebutting the presumption that he is likely to flee and that he is a danger to others and the community. No conditions, including those suggested by Diaz, would assure Diaz's appearance, nor would they prevent him from committing additional crimes, and thereby harming others and the community. See Tortora, 922 F.2d at 886-87.

The severity of the charges and the possibility of deportation, in particular, create a strong motivation not to appear in this court. The defendant's alleged sales of cocaine suggest that he poses a threat to the safety of others, and his history of traffic violations further supports that conclusion. In short, the court agrees with both the reasoning and the conclusion of the magistrate judge's order of detention. Diaz shall remain in detention pending trial.

Conclusion

For the foregoing reasons, Diaz's motion for review, revocation, and amendment of the magistrate's detention order (document no. 16) is denied.

SO ORDERED.


Joseph A. DiClerico, Jr.
United States District Judge

March 3, 2010

cc: Douglas J. Miller, Esquire
Michael J. Zaino, Esquire